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Supreme Court, U.S.
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No. 02-

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2002

REPUBLICAN NATIONAL COMMITTEE, ET AL.,
Appellants,

v.

FEDERAL ELECTION COMMISSION, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

REPLY IN SUPPORT OF JURISDICTIONAL STATEMENT

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ARGUMENT

On June 2, 2003 Intervenor-Appellees ("Intervenors") filed a response to the RNC Appellants' Jurisdictional Statement in which Intervenors sought summary dismissal or affirmance by this Court of the district court's holding that the challenges to BCRA Sections 214(b) and (c) (the Coordination Rulemaking Provisions) and BCRA Sections 304 and 319 (the "Millionaires Provisions") are nonjusticiable. The constitutional issues presented by the challenges to BCRA Sections 214(b), (c), 304 and 319 are too substantial and important to be summarily dismissed or affirmed without an opportunity for full and fair briefing of the issues. Further, with respect to Section 214, Intevenors' proposed alternative approach would deprive this Court from ever hearing the RNC Appellants' constitutional claims presented in this appeal.

Intervenors suggest that the Court should wait to consider RNC Appellants' challenge to Section 214 until after the FEC issues regulations defining coordination. But these regulations have already been issued. *See* 11 C.F.R. § 109.20-21 (2003). More to the point, the RNC Appellants challenge on constitutional grounds the *statutory* language that requires *any* FEC regulation to expand the definition of "coordination" to include situations without an agreement or formal collaboration. It deems RNC expenditures to be coordinated with candidates when they are in fact independent. In addition, it deems expenditures by non-candidate individuals and groups to be coordinated with the RNC when they are in fact independent. Thus, Section 214 requires that such non-candidate expenditures be treated as contributions to the RNC, even when they are in fact made independently. As Judge Henderson observed in dissent, "[Section] 214 will violate the First Amendment no matter what the [FEC] does, for no regulation it promulgates may depart . . . from the provision['s] plain text." Op. of

Henderson, J. at 394-95sa. At a minimum, the dispute between Judge Henderson and the other members of the district court confirms the existence of a substantial constitutional question that this Court can and should consider now.

Furthermore, Section 214 is merely one part of an interconnected statutory whole. For example, Section 213 requires that all political committees maintained by a national or state party be considered as one committee for the making of coordinated or independent expenditures. As Judge Henderson explained, the restrictions on political speech imposed by Section 214 are exacerbated by the unwarranted attribution required in Section 213. Op. of Henderson, J. at 396-97sa. Intervenors seek review of the district court decision unanimously striking down Section 213. In light of the interaction between the provisions, if the Court is to review one provision, it should review them both.

Finally, with regard to Section 214, Intervenors incorrectly suggest that the RNC Appellants can raise both their "constitutional and statutory challenges" under the Administrative Procedure Act after the FEC issues regulations. Intervenor Resp. at 3. To the contrary, Section 403 of BCRA vests *exclusive* jurisdiction over all constitutional challenges to BCRA in the three-judge panel of the district court. Thus, the RNC Appellants have brought their constitutional challenge to Section 214 in the only court where such a challenge can be made.

Intervenors also seek to avoid having to defend the Millionaire's Provisions on the erroneous ground that none of the RNC Appellants are harmed by the provisions and that they allegedly lack standing. To the contrary, the Millionaire's Provisions restrict the speech of political parties as well as candidates by requiring parties to spend less to support some similarly-situated candidates than others.

Intervenors suggest in response that the party can simply reduce its speech in some areas in order to treat all persons equally. Intervenor Resp. at 5. That is no answer, however, since any First Amendment challenge could be cured if the challenger would simply accept the restrictions being imposed. If the RNC fully exercises the statutory authority under BCRA, it will necessarily treat similarly situated candidates differently. Again, this challenge presents a substantial issue which warrants briefing and argument.

Congress intended questions regarding BCRA to be resolved expeditiously, and noting probable jurisdiction on all the challenged BCRA provisions is the way to satisfy this Congressional mandate. Failure to address these issues now will merely prolong the period of uncertainty about which Intervenors themselves complained when they sought a stay of the district court decision. *See* Intervenors' Reply to Certain Plaintiffs' Opposition to a Comprehensive Stay at 2. Indeed, Intervenors stand alone in their request for summary action. The Executive Branch appellees have acknowledged that "appellants' jurisdictional statement identifies substantial questions of federal law and that this Court should note probable jurisdiction over the appeal." *See* Executive Branch Resp. at 3. The Executive Branch appellees further stated that they were not seeking dismissal or summary affirmance of the district court's justiciability rulings in order to facilitate the expeditious review mandated by statute. *See* Executive Branch Resp. to McConnell Plaintiffs at 7.

CONCLUSION

For the foregoing reasons, Intervenors' request for dismissal or summary affirmance of the district court's decision on BCRA Sections 214(b) and (c), 304, and 319

should be denied, and the Court should note probable jurisdiction over all of the issues set forth in the RNC Appellants' Jurisdictional Statement.

Respectfully submitted,

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